LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
AUG 17 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962

No. 348

EVELYN LUNDBERG, Administratrix of the Estate of Stanley A. Lundberg, Deceased,

Petitioner,

vs.

ROSE FUEL & MATERIALS, INCORPORATED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MAURICE N. FRANK,
404 W. Jefferson Blvd.,
South Bend, Indiana,

GEORGE S. KELLER,
111 North 4th Street,
Niles, Michigan,

BENJAMIN PISER,
Whitcomb-Keller Building,
South Bend, Indiana,

Counsel for Petitioner.

Midwest Law Printing Co., 326 N. Michigan Ave., Chicago
Telephone: Financial 6-3988

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Provisions, Statutes and Regulations Involved	3
Statement of Facts	4
Reasons for Granting the Writ	7
Conclusion	10
Appendix A — Opinions Below	11

CITATIONS

Cases:

Beacon Theatres v. Westover, 359 U.S. 500 (1959)	7
Chicago & N. W. Ry. Co. v. Greene, 164 F. 2d 55 (CA 8, 1947)	8, 9
Dimick v. Schiedt, 292 U.S. 474 (1934)	7
Home Ins. Co. v. Consolidated Bus Lines, 179 F. 2d 768 (CA 4, 1950)	8
Klas v. Yellow Cab Co., 104 F. 2d 935 (CA 7, 1939)	8, 9
Montgomery v. Virginia Stage Lines, 191 F. 2d 770 (CA DC, 1951)	8, 9

Provisions, Statutes, Regulations:

United States Constitution, Amendment VII	3
Title 28, U.S.C., Section 2111	3, 9
Federal Rule of Civil Procedure 61	3, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962

No.

EVELYN LUNDBERG, Administratrix of the Estate of Stanley A. Lundberg, Deceased,

Petitioner,

vs.

ROSE FUEL & MATERIALS, INCORPORATED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Evelyn Lundberg prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on April 23, 1962.

CITATIONS TO OPINIONS BELOW.

The judgment of the district court was entered on the verdict of the jury. No opinion was written. The opinion of the Court of Appeals is reported in 302 F. 2d 825, and is reprinted in Appendix A, *infra*, p 11.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 23, 1962. A petition for rehearing was timely filed. It was denied on May 23, 1962. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED.

The petitioner, plaintiff in an action to recover for herself and her children for the wrongful death of her husband, appealed to the court of appeals from a judgment entered on a general verdict in favor of the respondent, the defendant below. In the court of appeals she contended that the trial judge erred in refusing her request that he charge the jury in terms of her specific theory of recovery, which was that the respondent's driver was obliged to maintain a proper lookout in his operation of a tractor-trailer which collided with her decedent's automobile. The court of appeals found that there was evidence sufficient to sustain the petitioner's theory and that the refusal of the trial court to give her requested charge was error. It nevertheless held, with one of the three judges dissenting, that the error was harmless because the jury answered interrogatories submitted with the case in a manner consistent with its general verdict.

The question presented is: May the trial court's error in failing to instruct the jury as to the law applicable to the case under the evidence and in failing to tender petitioner's requested charge embodying her theory of recovery be properly termed harmless error because the jury answered interrogatories submitted with the request for a general verdict in a matter consistent with its general verdict?

PROVISIONS, STATUTES AND REGULATIONS INVOLVED.

1. United States Constitution, Amendment VII:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

2. Title 28, United States Code, section 2111:

"Harmless Error. On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

3. Federal Rule of Civil Procedure 61, *Harmless Error.*

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

STATEMENT OF FACTS.

The petitioner commenced this action in the United States District Court for the Northern District of Indiana to recover damages for herself and her children for the wrongful death of her husband. The District Court had jurisdiction of the action under Title 28 U.S.C., Section 1332, the petitioner being a citizen of the State of Michigan and the respondent being a corporation incorporated under the laws of the State of Indiana and having its principal place of business in Indiana and the sum in controversy exceeding ten thousand dollars ($10,000.00), exclusive of interest and costs.

The petitioner's husband was killed in a head-on collision between the automobile which he was driving and a truck operated by the respondent's driver. The collision occurred on a straight road under conditions of clear visibility. The petitioner introduced evidence which tended to show that the collision resulted when the respondent's driver veered his truck into the lane lawfully occupied by the oncoming automobile driven by the petitioner's husband.

The respondent's driver testified that he veered his truck sharply toward the lane of traffic which the petitioner's husband was lawfully entitled to occupy in order to avoid a collision because the petitioner's husband had been occupying the driver's proper lane immediately before the collision.

At the close of the evidence, the petitioner requested the court to instruct the jury that the failure of a driver to maintain a proper lookout would constitute negligence, and that if it found that the respondent's driver failed to maintain a proper lookout and that such failure caused the collision in question, it should find for the petitioner. (In-

structions Nos. 9 and 10, Appellant's Appendix, p. 21.) The court refused to give the instructions for the reason that it found no evidence to support the contention that the respondent's driver failed to keep a proper lookout.

The case was submitted to the jury for its general verdict. With the request for a general verdict, the court, at the request of the respondent and over the objection of the petitioner, submitted to the jury for its answers the following interrogatories.

> "1. As the passenger car operated by the deceased approached the scene of the accident, was it at any time in the northbound lane of traffic?
>
> "2. If your answer to the foregoing interrogatory is in the affirmative, did the deceased immediately before the collision turn his motor vehicle from the northbound lane of traffic on to or across the center line of the highway?
>
> "3. Did the defendant's driver turn to his left onto or across the center line of the highway immediately before the collision?" (Appellant's Appendix, pp. 22-23.)

The jury returned a general verdict for the respondent. It answered each of the above interrogatories in the affirmative.

From the judgment of the district court entered on the verdict of the jury, the petitioner appealed. She contended that the evidence in the case entitled her to her requested charges respecting the duty of the respondent's driver to maintain a proper lookout.

Each of the three judges on the panel of the Seventh Circuit which heard the appeal wrote an opinion in the case. (Appendix A, *infra*.) Two of the judges held that the trial court was in error in failing to charge in accordance with the petitioner's request because the petitioner's evidence of

the question of the respondent's driver's failure to keep a proper lookout was sufficient to present a question for the jury. Further, the majority opinion recognized that the issue as to whether the respondent's driver had kept a proper lookout was "the basic factual question at the trial." Nevertheless, one of the two judges who were of the opinion that the failure of the trial court to give any charge on the issue of failure to keep a proper lookout constituted error held that the error did not affect a substantial right of the petitioner. He so held solely because the jury answered the accompanying interrogatories in a manner consistent with the respondent's driver's account of the collision. The vote of this judge combined with the vote of the third judge, who found no error in the charge, to result in a 2-1 vote for affirmance of the judgment.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court of Appeals for the Seventh Circuit in this case effectively deprives the petitioner of her right to trial by jury guaranteed by the Seventh Amendment to the Constitution. "Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick* v. *Schiedt*, 292 U.S. 474, 486; *Beacon Theatres* v. *Westover*, 359 U.S. 500, 501.

The right to trial by jury in a case submitted to the jury for its general verdict clearly includes the right to trial by a jury correctly instructed as to the law applicable to the evidence. In this case the Seventh Circuit Court of Appeals has unequivocally held that the jury was not correctly instructed as to the law applicable to the evidence. Further, it was held that the error in the failure to give the requested instructions went to the "basic factual question at the trial." (Majority opinion, Appendix A, *infra*, pp. 12-13) The Seventh Circuit nevertheless condones this clear violation of the petitioner's right to a trial by a jury correctly informed of the law applicable to the evidence and of the petitioner's contentions with respect to that evidence solely because the jury, sent to its deliberations without benefit of the law favorable to the plaintiff or of her contentions as to its applicability under the evidence, returned a general verdict for the respondent and answered interrogatories in a manner consistent with its verdict.

The Seventh Circuit has here held that a jury may be allowed to deliberate entirely in the dark with respect to the law or to the plaintiff's factual contentions as long as

the product of its deliberation includes along with a general verdict answers to interrogatories which are consistent with the general verdict. This holding destroys the reason for the settled rule in jury trial actions in federal courts that both parties are entitled to have their factual theories presented to the jury and that it is reversible error to submit the theory of one party and not call attention to the main points of the opposite party's case. *Montgomery* v. *Virginia Stage Lines*, 191 F. 2d 770, 772 (CA DC, 1951); *Chicago & N.W. Ry. Co.* v. *Green*, 164 F. 2d 55, 61 (CA 8, 1947); *Home Ins. Co.* v. *Consolidated Bus Lines*, 179 F. 2d 768 (CA 4, 1950); *Klas* v. *Yellow Cab Co.*, 106 F. 2d 935, 937 (CA 7, 1939). The obvious reason for that rule is that elementary fairness requires that the jury be sent to its deliberation alerted to the contentions of both parties with respect to the legal significance of the evidence. If the jury is alerted to one party's contentions only, it surely cannot be said that the adverse party was not deprived of a substantial right merely because the jury, in finding in favor of the only party whose contentions were forcefully and immediately put before it at the critical stage of the court's charge, answered interrogatories consistent with its general finding.

2. The decision of the Seventh Circuit in this case is in conflict with the general holding in other circuits, and in the Seventh Circuit as well, that, as the Fourth Circuit has stated it:

> "The trial judge may, of course, express an opinion upon the facts; but he may not withdraw material evidence from the jury; and it is reversible error to submit the evidence and theory of one party prominently and fully, as was done here, and not call attention to the main points of the opposite party's case." *Home Insurance Co.* v. *Consolidated Bus Lines*, 179 F. 2d 768 (CA 4, 1950).

The following decisions are in accord: *Montgomery* v. *Virginia Stage Lines*, 191 F. 2d 770, 772 (CA DC, 1951); *Chicago & N.W. Ry. Co.* v. *Green*, 164 F. 2d 55, 61 (CA 8, 1947); *Klas* v. *Yellow Cab Co.*, 106 F. 2d 935, 937 (CA 7, 1939).

What the trial court did in this case, as the majority of the Seventh Circuit Court of Appeals recognized in the opinions, was not simply to fail to "call attention to the main points of the opposite party's (petitioner's) case," but to fail utterly to apprise the jury either of the petitioner's theory of her case or of the law upon which she might recover.

The Court of Appeals nevertheless affirmed the judgment of the trial court. The majority opinion predicates affirmance upon Federal Rule of Civil Procedure 61, entitled "Harmless Error." The petitioner suggests that inasmuch as the rule is invoked at the level of the court of appeals the authority invoked by that court is Title 28, U.S.C., Section 2111, also entitled "Harmless Error." But with respect to the issue raised in this petition the question of whether Rule 61 or Section 2111 is applicable is without significance. Both provisions express the policy that error should not undo the result of a trial if it does not "affect the substantial rights of the parties."

But neither Rule 61 nor 28 U.S.C. 2111 can justify the action of the Court of Appeals in affirming the judgment of the district court in the instant case. The error complained of in this case is radical. The trial court although requested to do so failed to charge the jury with respect to the petitioner's factual theory of recovery and failed to advise the jury of the law with respect to the standard of care required of the respondent's servant. Its failure to do so effectively deprived the petitioner of an essential inci-

dent to her right to trial by jury. The disregard of error so substantial by application of the harmless error doctrine is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MAURICE N. FRANK,
GEORGE S. KELLER,
BENJAMIN PISER,
Counsel for Petitioner.

APPENDIX A — OPINIONS BELOW.

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 13521 September Term, 1962 January Session, 1962

Evelyn Lundberg, Administratrix of the Estate of Stanley A. Lundberg, Deceased,
Plaintiff-Appellant,
v.
Rose Fuel & Materials, Inc.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

April 23, 1962

Before HASTINGS, *Chief Judge*, SCHNACKENBERG and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* This is a diversity wrongful death action based on a collision between defendant's tractor trailer and a passenger automobile driven by plaintiff's decedent. Verdict and judgment were for defendant, and plaintiff has appealed.

The collision occurred about 5:30 a.m. on State Road No. 219, a two-lane highway, south of its junction with State Road No. 20 near Osceola, Indiana. The tractor trailer was north bound in the east lane and decedent's

car south bound in the west lane. Decedent and his two passengers were killed instantly.

The only question on appeal is whether the District Court committed reversible error in refusing to give instructions upon plaintiff's theory that the collision occurred because defendant's driver negligently failed to keep a proper lookout, proximately causing the death of plaintiff's decedent.

Plaintiff tendered two instructions on its theory. One was a general statement of the duty of an operator of a motor vehicle to maintain a reasonable lookout "for other traffic on the highway," and that failure to do so was negligence. The other instruction was peremptory, applying the general rules to the case at bar.

The District Court found no evidence to support the proffered instructions. We think this was error. Taking as true the evidence favorable to plaintiff and drawing legal inferences in her favor, *Hower* v. *Roberts*, 8 Cir., 153 F. 2d 726, 727 (1946), we find evidence to support plaintiff's theory of failure of defendant's driver to maintain a proper lookout. It follows that plaintiff was entitled to have the instructions given on that theory. *Montgomery* v. *Virginia Stage Lines*, D.C. Cir., 191 F. 2d 770, 772 (1951); *Klas* v. *Yellow Cab Co.*, 7 Cir., 106 F. 2d 935, 937 (1939). For the reasons given hereinafter, we need not detail the evidence supporting the instructions.

Despite the conclusion that the District Court erred in refusing to give the instructions proffered by plaintiff on "proper lookout," the judgment must be affirmed.

The basic factual question at the trial was whether decedent, under defendant's theory, was in the wrong north

bound lane just before the collision so as to give rise to an emergency in which the truck driver had to decide within three seconds how to avoid decedent's car coming toward him on a collision course; or whether decedent's car, under plaintiff's theory, was in the right south bound lane into which the fatigued truck driver, failing to keep a proper lookout, veered into the wrong south bound lane.

The jury was properly instructed on the law of Indiana on this question, that is, a person who drives on the wrong side of a highway is guilty of negligence unless he shows justification or excuse. *Burns Ind. Stat.* §47-2010 (1961 Supp.); *Gamble* v. *Lewis*, 227 Ind. 455, 85 N.E. 2d 629, 633 (1949); *Freeport Motor Cas Co.* v. *Chafin*, ... Ind. App. ...., 170 N.E. 2d 698 (1960).

In special interrogatories the jury found that decedent's car was at some time in the wrong north bound lane as it "approached the scene," and that "immediately before the collision" he turned his car from the north bound lane "on to or across the center line;" and that defendant's driver turned to "his left onto or across the center line • • • immediately before the collision." These interrogatories are founded on testimony of the truck driver and his testimony gives substantial support to the affirmative answers. The jury presumably found decedent on the wrong side of the road and no showing is made of justification or excuse.

The special finding, not contested as such here, definitively locates decedent "immediately" before the collision on the wrong side of the road. This means that the jury gave greater credibility to the truck driver's testimony than to that of Goss, plaintiff's principal witness. The

testimony of Goss supported her theory that decedent was on the right side of the road for the entire interval of three seconds after the truck driver "crested" a hill, south of the scene, and saw decedent's headlights for the first time.

This being so, the question of "proper lookout" is inconsequential. That theory of negligence presupposes that the truck driver did not see decedent's car in the south bound lane and veered into it without "justification or excuse." But the jury decided decedent's car was not in the south bound lane until he turned it from the north bound lane as the truck driver, in a quick response to the emergency decedent created, also turned into that lane.

We conclude that the District Court's error is not ground for a retrial, since we have decided that the error does not affect a substantial right of plaintiff.[1]

The judgment is AFFIRMED.

---

[1]Fed. R. Civ. P. 61.

HASTINGS, *Chief Judge.* I concur in the result reached in this case.

I do not agree that the trial court erred in refusing to give plaintiff's tendered instructions Nos. 9 and 10. No. 9 merely is an abstract statement of the law that the operator of a motor vehicle upon a public highway is required to maintain a reasonable lookout for other traffic on the highway and that failure to do so would constitute negligence. No. 10 is a peremptory instruction based upon the same rule applied to this case.

The jury answered three special interrogatories favorably to defendant, as follows:

"Interrogatory Number 1:

"As the passenger car operated by the deceased approached the scene of the accident, was it at any time in the northbound lane of traffic?

"Yes.

"Interrogatory Number 2:

"If your answer to the foregoing interrogatory is in the affirmative, did the deceased immediately before the collision turn his motor vehicle from the northbound lane of traffic on to or across the center line of the highway?

"Yes.

"Interrogatory Number 3:

"Did the defendant's driver turn to his left onto or across the center line of the highway immediately before the collision?

"Yes."

(Opinion)

I agree with the trial court that the instructions with respect to lookout should not have been given for the reason that there is no evidence in the record and no special issue raised by the pleadings tendering the issue of "reasonable lookout" for the jury to pass upon. This was well settled in Indiana in *N. Y. Cent. R.R. Co.* v. *Perkins*, 125 Ind. App. 320, 122 N.E. 2d 141, on petition for rehearing, 122 N.E. 2d 738 (1954). Indeed, in that case the court held it reversible error to deny an instruction withdrawing the issue of lookout from the jury.

Assuming, *arguendo*, that Instructions Nos. 9 and 10 were proper and should have been given, then I agree that the failure to do so was not prejudicial error under the facts of this case.

This appeal presents a clear case of contributory negligence as a matter of law on the part of plaintiff's decedent, and under these circumstances plaintiff may not recover. *Gamble* v. *Lewis*, 227 Ind. 455, 463, 85 N.E. 2d 629, 634 (1949). *Cf. Lee* v. *Terminal Transport Company*, 7 Cir., 269 F. 2d 97, 99 (1959).

In another Indiana diversity case, where a skidding truck created an emergency situation and defendant's driver was charged with failing to observe it coming across the highway, we held that as a matter of law defendants were not guilty of actionable negligence. *Martin* v. *United Moving and Storage Company*, 7 Cir., 262 F. 2d 596, 600 (1959).

(Opinion)

No. 13521

SCHNACKENBERG, *Circuit Judge*, dissenting.

Judge Kiley recognizes that there was evidence to support two instructions tendered by plaintiff which would have informed the jury of the duty of an operator of a motor vehicle to maintain a reasonable lookout for "other traffic on the highway" and that failure to do so would be negligence. He admits that the district court erred in rejecting these instructions, and I agree with that conclusion.

However, with such evidence admittedly in the record, the answers made by the jury to three special interrogatories, referring to the movement of decedent's car into the "wrong" lane and back into the "right" lane, indicate that the ultimate question of which driver caused the collision presented to the jury a particularly difficult question. Therefore plaintiff was entitled to have the law applicable to that situation presented to the jury in the two instructions which were rejected by the court. I agree with Judge Kiley that the rejection was error but I do not agree that it was not prejudicial. It destroyed plaintiff's chance for recovery. It left the jury groping in the dark as to the law applicable to a sensitive part of the case. The answers to the interrogatories are not inconsistent with a verdict for plaintiff.

I would reverse and remand for a new trial.

A true Copy:

Teste: .....

Clerk of the United States Court of Appeals for the Seventh Circuit.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 13 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962

No. 348

EVELYN LUNDBERG, Administratrix of the Estate of Stanley A. Lundberg, Deceased,

Petitioner,

v.

ROSE FUEL & MATERIALS, INCORPORATED,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JAMES J. STEWART,
1200 Merchants Bank Building,
Indianapolis, Indiana,
ALVIN E. MEYER,
1200 Merchants Bank Building,
Indianapolis, Indiana,
WILLIAM MILLS,
301 Odd Fellows Building,
South Bend, Indiana,
Attorneys for Respondent.

C. E. Pauley & Co., Inc., Indianapolis

INDEX

Constitutional Provisions, Statutes and Court Rules Involved 1
Question Presented for Review 4
Statement of the Case 4
Summary of Argument 4
Argument 5
Conclusion 14

Citations

Cases: *Page*

American Construction Co. v. Jacksonville, T. & K. W. R. Co. (1891), 148 U.S. 372, 383, 37 L.Ed. 486, 491 6
Anderson v. Abbott, 321 U.S. 349, 356, 88 L.Ed. 793, 799 7
Bass v. Dehner (C.C.A. 10th 1939), 103 F.2d 28 ..... 10, 11, 12
Boehmer v. Penn. R. R. Co., 252 U.S. 496, 64 L.Ed. 680, 684 7
Chicago B. & Q. R. Co. v. Chicago, 166 U.S. 226, 246, L.Ed. 979 13
Erie R. R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) 7
First Unitarian Society of Chicago v. Faulkner, 91 U.S. 415, 23 L.Ed. 283 13
Freeport Motor Casualty Co. v. Chapin, 131 Ind. App. 362, 170 N.E.2d 819 (1960) 8
Gamble v. Lewis, 227 Ind. 455, 85 N.E.2d 629, 633 (1949) 6, 8, 9
Harris v. Penn. Railroad Co. (1959), 361 U.S. 15, 4 L.Ed.2d 1, 80 S.Ct. 22 7

Home Insurance Company v. Consolidated Bus Lines (C.C.A. 4th 1950), 179 F.2d 768, 772 ..... 11, 12
Klas v. Yellow Cab Co. (C.C.A. 7th 1939), 106 F.2d 935 12
Lee v. Terminal Transport Co. 7th Circuit 269 F.2d 97, 99 (1959) 9
Lustine-Nicholson Motor Company v. Petzal (U.S. C.A. D.C. 1959), 268 F.2d 893 ..... 10, 12
Luther v. Maple (C.C.A. 8th 1958), 250 F.2d 916 12
N.Y.C. R.R. Co. v. Verkins, 125 Ind.App. 320, 122 N.E.2d 141, on pet. for rehearing 122 N.E.2d 738 (1954) 8
Palmer v. Hoffman (1943), 318 U.S. 109, 118, 87 L.Ed. 645 7
Partlow v. Goldstein (C.C.A. 8th 1959), 263 F.2d 169 12
Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 1 L.Ed. 493 (1957) 7
Steele v. General Mills, 329 U.S. 433, 438, 91 L.Ed. 402, 407 7
U.S. v. Bayer, 331 U.S. 532, 67 S.Ct. 1394, 91 L.Ed. 1654 13

Constitutional Provisions, Statutes, Rules:

United States Constitution, Amendment VII 1, 10
Rule 61, Federal Rules of Civil Procedure 1
Title 28, U.S.C., Section 2111 ..... 2, 13
Burns Indiana Stat., Section 47-2010 (1961 Supp.) .. 2, 6
Burns Indiana Stat., Section 47-2011 (1952 Repl.) .. 3, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962

No. 348

EVELYN LUNDBERG, Administratrix of the Estate of Stanley A. Lundberg, Deceased,

Petitioner,

v.

ROSE FUEL & MATERIALS, INCORPORATED,

Respondent.

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

United States Constitution, Amendment VII:

"*Trial by jury in civil cases.*—In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

Rule 61, Federal Rules of Civil Procedure:

"*Harmless error.*—No error in either the admmission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by

the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.".

Title 28, U.S.C., Section 2111:

"*Harmless error.*—On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." (June 25, 1948, c. 646, § 1, as added May 24, 1949, c. 139, § 110, 63 Stat. 105.)

Burns Indiana Stat., Section 47-2010 (1961 Supp.):

"*Drive on right side of roadway—Overtaking and passing.*—Upon all roadways of sufficient width, a vehicle shall be driven upon the right half of the roadway except as follows:

1. When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement;

2. When the right half of a roadway is closed to traffic (while) under construction or repair;

3. Upon a roadway divided into three (3) marked lanes for traffic under the rules applicable thereon; or

4. Upon roadway designated and sign-posted for one-way traffic.

5. Upon all roadways any vehicle proceeding at less than the normal speed of traffic at the time and place under the conditions then existing shall be driven in the right-hand lane then available for traffic or as close as

practicable to the right-hand curb or edge of the roadway, except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection or into a private road or driveway." (Acts 1939, ch. 48, § 1, p. 289; 1955, ch. 76, § 3, p. 158.)

Burns Indiana Stat., Section 47-2011 (1952 Repl.):

"*Passing vehicles proceeding in opposite directions.*— Drivers of vehicles proceeding in opposite directions shall pass each other to the right and upon roadways having width for not more than one (1) line of traffic in each direction, each driver shall give to the other at least one-half ($\frac{1}{2}$) of the main traveled portion of the roadway as nearly as possible." (Acts 1939, ch. 48, § 62, p. 289.)

QUESTION PRESENTED FOR REVIEW

Petitioner urges one question for review; whether prejudicial error resulted from the trial judge's refusal to instruct on the question of the duty of Respondent's driver to maintain a proper lookout. Petitioner claims such refusal violated her constitutional right to jury trial under the Seventh Amendment.

STATEMENT OF THE CASE

This is a diversity action for damages for alleged wrongful death resulting from a head-on collision between motor vehicles operated by petitioner's deceased husband and the Respondent's truck driver. The accident occurred on an open two lane highway in northern Indiana at night time. Admittedly, the truck driver was partially to the left of center line at the time of impact, but he claimed, and the jury so found, by answers to interrogatories, that immediately before the accident he was in his proper lane and swerved to his left in an unsuccessful effort to avoid a head-on collision with the deceased who was on the wrong side of the highway.

The petitioner offered no evidence tending to explain or excuse the fact that immediately before the collision her husband was driving to the left of the center line. The jury entered a verdict for the defendant-respondent, consistent with its special findings of fact, upon which judgment was entered by the District Court, which was affirmed by the Seventh Circuit Court of Appeals. *Lundberg* v. *Rose Fuel & Materials, Inc.*, 302 F. 2d 825 (1962).

SUMMARY OF ARGUMENT

1. The trial court's refusal to instruct upon the subject of the duty to maintain a lookout was "inconsequential"

because the jury decided decedent's car was on the wrong side of the road "immediately" before the accident, thereby creating an emergency in which respondent's driver had to respond.

2. The questions involved were properly decided and are not of such gravity and general importance as to require granting of certiorari by this court.

3. Jurisdiction is based upon diversity and the questions for decision are factual and involve only interpretation of Indiana Law, by which the Court is bound.

4. The trial court properly refused to instruct upon the subject of lookout for the reason that there was no evidence in the record and no special issue made by the pleadings creating such an issue.

5. The error, if any, on failure to instruct upon the subject of lookout was harmless because the deceased, being on the wrong side of the road without justifiable excuse immediately prior to the accident was guilty of contributory negligence as a matter of Indiana Law.

6. The jury was fully and fairly instructed upon petitioner's "theory" of the case.

7. The decision of the Court of Appeals is not in conflict with decisions of other circuits or of this Court.

ARGUMENT

(a) The error, if any, in failing to instruct on lookout was harmless since the evidence established that respondent's driver acted in an emergency negligently created by the deceased.

The majority opinion of the Seventh Circuit Court of

Appeals held there was error in failing to give the instruction on lookout but also held that such error was not prejudicial and "did not affect a substantial right of plaintiff." It was pointed out that the jury was properly instructed that "a person who drives on the wrong side of a highway is guilty of negligence unless he shows some justification or excuse. Burns Ind. Stat. Sec. 47-2010 (1961 Supp.); *Gamble* v. *Lewis*, 227 Ind. 455, 85 N.E. 2d 629, 633 (1949)." See also Sec. 47-2011; Burns Ind. Stat. (1952 Repl.). Judge Kiley, who wrote the opinion, also pointed out, page 826 of 302 F. 2d, that the jury gave greater credibility to the truck driver's testimony (which was strongly supported by other evidence) to the effect that he turned to his left immediately before the collision to avoid a head-on collision with the decedent's car, than they gave to petitioner's evidence. Judge Kiley concluded:

> "This being so, the question of 'proper lookout' is inconsequential. That theory of negligence presupposes that the truck driver did not see decedent's car in the south bound lane and veered into it without 'justification or excuse.' But the jury decided decedent's car was not in the south bound lane as the truck driver, in a quick response to the emergency decedent created, also turned into that lane."

(b) **There are no questions involved of such importance to justify certiorari.**

It is, of course, fundamental that the review of a judgment of the Circuit Court of Appeals by certiorari is to be exercised sparingly and only in cases (1) of gravity and general importance or (2) in order to secure uniformity of decision. *American Construction Co* v. *Jacksonville, T. & K. W. R. Co.* (1891), 148 U.S. 372, 383, 37 L.Ed. 486, 491.

(c) Factual and local questions only being involved, the Federal Court of Appeals should not intervene.

Where the jurisdiction of the Federal Court is dependent upon diversity of citizenship and where the question involves an application of the law of the state, the judgment of the District Court, concurred in by the Circuit Court of Appeals, should be considered final and not disturbed unless there is a plain showing of prejudicial error. *Palmer* v. *Hoffman* (1943), 318 U.S. 109, 118, 87 L.Ed. 645, 652; *Steele* v. *General Mills*, 329 U.S. 433, 438, 91 L.Ed. 402, 407; *Anderson* v. *Abbott*, 321 U.S. 349, 356, 88 L.Ed. 793, 799; *Boehmer* v. *Penn. R.R. Co.*, 252 U.S. 496, 64 L.Ed. 680, 684. The substantive law of Indiana governs. *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

In at least two recent F.E.L.A. cases, this court has emphasized the importance of jury verdicts as the final determination of the facts in litigation. In *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 1 L.Ed. 2d 493 (1957), at page 510 of the U.S. Reporter, the court said:

> "Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination."

In *Harris* v. *Pennsylvania Railroad Co.* (1959), 361 U.S. 15, 4 L.Ed. 2d 1, 80 S.Ct. 22, at page 15 of the U.S. Reporter, it was said:

> "We hold that the proofs justified with reason the jury's conclusion embodied in answers to interrogatories to the jury numbered I and II, that the employer's negligence played a part in producing the petitioner's injury."

The basic fallacy in petitioner's reasoning is the apparent assumption that the giving of an instruction on the duty to maintain proper lookout would have influenced the jury's findings of fact relative to which driver was on the wrong side of the road. Obviously, the giving, or the failure to give, such an instruction could not have influenced the jury's determination of this or any other fact. The jury's findings of fact are properly based upon the evidence and not upon the instructions.

(d) **There was no issue on lookout made by the pleadings or evidence.**

Actually, as Judge Hastings of the Seventh Circuit pointed out in his separately written opinion at 302 F. 2d 825, 826:

> "The instruction with respect to lookout should not have been given for the reason that there is no evidence in the record and no special issue raised by the pleadings tendering the issue of 'reasonable lookout' for the jury to pass upon. This was well settled in Indiana in *N.Y.C. R.R. Co.* v. *Perkins*, 125 Ind. App. 320, 122 N.E. 2d 141, on petition for rehearing, 122 N.E. 2d 738 (1954). Indeed, in that case the court held it reversible error to deny an instruction withdrawing the issue of lookout from the jury."

(e) **Petitioner's deceased was guilty of contributory negligence as a matter of Indiana law.**

The Indiana cases make it clear that a person who drives on the wrong side of a highway is guilty of negligence unless he shows justification or excuse, *Gamble* v. *Lewis*, 227 Ind. 455, 85 N.E. 2d 629, 633 (1949); *Freeport Motor Casualty Co.* v. *Chapin*, 131 Ind.App. 302, 170 N.E. 2d 698 (1960).

Petitioner's failure to produce evidence showing justifiable excuse for being on the wrong side of the highway at the time of the accident constituted contributory negligence as a matter of law in Indiana. *Gamble* v. *Lewis*, 227 Ind. 455, 85 N.E. 2d 629, 634; *Lee* v. *Terminal Transport Co.*, 7th Circuit 269 F. 2d 97, 99 (1959).

Obviously, therefore, the error involved, if any in failure to instruct the jury on the law of lookout was harmless, since the facts found by the jury, as evidenced by their answers to interrogatories, established that the deceased was guilty of negligence as a matter of Indiana law. In a case factually in point, the Supreme Court of Indiana has said:

> "We believe that when the appellee drove to his left of the center of State Road No. 38, it was prima facie evidence of negligence. There is no evidence in the record, or any reasonable inference from any evidence which would excuse such conduct, and, therefore, *as a matter of* law we must hold that he is guilty of negligence. The *only reasonable inference* from such conduct and the facts in this appeal is that such negligence was *a proximate cause* of the collision; hence the verdict was not sustained by sufficient evidence and was contrary to law." (Emphasis ours.) *Gamble* v. *Lewis*, 227 Ind. 455, 85 N.E. 2d 629, 634.

Clearly therefore, the basic issues involved in this petition pertain exclusively to interpretation and application of local Indiana law and are not of such gravity or general importance as to justify consideration by the Supreme Court of the United States. Petitioner, in reality, seeks re-examination of facts found by the jury. This cannot be done by certiorari or appeal to this court under the authorities previously cited.

Petitioner's rights under the Seventh Amendment to the Constitution were not infringed by the action of the trial court in failing to instruct the jury on the legal duty to maintain "proper lookout" as petitioner now argues for the first time without benefit of supporting authority. Petitioner's assertions run afoul of the clear intent of the language of the Seventh Amendment that:

> "*No fact tried by a jury shall be otherwise reexamined in any court of the United States,* than according to the rules of the common law." (Emphasis added.)

Petitioner would have the Court of Appeals or this court substitute its judgment of what the facts were, as revealed by the evidence, rather than accept the general verdict and special findings of the jury which clearly indicate the negligence of the petitioner's decedent. Prejudicial error does not result, nor are constitutional rights denied, by a refusal to give a particular instruction where it is inapplicable, or where facts found by the jury can lead to but one result. This is convincingly illustrated in *Bass* v. *Dehner* (C.C.A. 10th 1939), 103 F. 2d 28, pp. 31, 33 and 34, and stated aptly by the court in *Lustine-Nicholson Motor Company* v. *Petzal*, (U.S.C.A. D.C. 1959), 268 F. 2d 893, at page 895:

> "Appellant next argues that the District Court erred in denying a requested instruction on the doctrine of assumption of risk. This instruction would be relevant only if the jury accepted the appellant's theory of the case."

(f) The jury was properly instructed on petitioner's theory of the case.

The petitioner complains of failure of the trial judge to instruct the jury on her theory of the case but that was not

true. Petitioner's Instructions Nos. 6A, 7 and 8 and respondent's Instruction No. 6 (Appellant's Appendix, pp. 10 to 12) fully and fairly informed the jury of the law applicable to driving to the left of center of the highway, which was the charge made by petitioner against the respondent and the real "theory" of petitioner's case. The jury determined the issue adversely to petitioner's contention, and found it was petitioner's decedent who was improperly and without excuse on the wrong side of the roadway. Instructions tendered by petitioner and given by the court informed the jury respondent's agent was negligent if he drove into the lane of traffic where the collision occurred, unless there was excuse therefor and, that it was incumbent upon respondent to produce evidence excusing its driver for being in the lane where the collision occurred. This burden respondent discharged and the answers to interrogatories left no doubt that the jury found a justifiable excuse for the action of respondent's agent. It was held in *Bass* v. *Dehner* (C.C.A. 10th 1939), 103 F. 2d 28, at page 34:

> "Where special findings by the jury show that plaintiff's intestate was not injured by an instruction, error therein is without prejudice."

(g) The decision of the Court is not in conflict with decisions of other jurisdictions.

The decision quoted by petitioner from the 4th Circuit, *Home Insurance Company* v. *Consolidated Bus Lines*, 179 F. 2d 768, involved a commentary on evidence by the trial judge which the Court of Appeals determined included statements:

> "that did not set out the testimony with complete accuracy." (p. 772.)

The decision in *Home Insurance Company* is not in conflict with the decision of the Seventh Circuit in this case; it is decided upon a different principle of law. The *Petzal* decision of the Court of Appeals for the District of Columbia is in complete harmony with the decision of the Seventh Circuit in this case, as is the holding of the Tenth Circuit in *Bass* v. *Dehner.*

The petitioner asserts that Title 28, U.S.C., Section 2111 and Rule 61 of the Federal Rules of Civil Procedure governing harmless error were improperly applied by the Court of Appeals in affirming the judgment of the trial court. Petitioner also asserts the decision of the Court of Appeals conflicts with decision of the Fourth, Seventh, Eighth and District of Columbia Circuits dealing with Appellate review of claimed prejudicial error resulting from failure to instruct on requested legal principles applicable to a party's theory of action.

Klas v. *Yellow Cab Company* (C.C.A. 7th 1939), 106 F. 2d 935, cited by petitioner, was not reversed on appeal and is, therefore not applicable. The decision of the Fourth Circuit in the *Home Insurance Company,* 179 F. 2d 768, case has been heretofore distinguished in this brief.

The Court of Appeals for the Eighth Circuit has applied the doctrine of harmless error where the general verdict of the jury is supported by substantial evidence regardless of claimed error in instructions given or refused. *Partlow* v. *Goldstein* (C.C.A. 8th 1959), 263 F. 2d 169 and *Luther* v. *Maple* (C.C.A. 8th 1958), 250 F. 2d 916, at page 921. Respondent has heretofore referred to the decision in *Lustine-Nicholson Motor Company* v. *Petzal* (U.S.C.A. D.C. 1959), 268 F. 2d 893, which accords with the decision of the Seventh Circuit in this case.

This court, on numerous occasions has considered questions of error in the charges of trial judges to juries. The responsibility of Appellate Courts in reviewing such questions has been clearly defined.

> "Once the judge has made an accurate and correct charge, the extent of its amplification must rest largely in his discretion." *U.S. v. Bayer*, 331 U.S. 535, 536, 67 S.Ct. 1394, 1396, 91 L.Ed. 1654.

It is respectfully suggested that the following statement of this court is really applicable to petitioner's argument:

> "Even now though the complaining party has filed an assignment of errors and submitted a written argument, it is by no means certain what the precise complaint is, unless it be that the verdict, in their view, is for the wrong party. Courts of error have nothing to do with the verdict of the jury, if it is general and in due form, except to ascertain, if they can, whether improper evidence was admitted to the jury or whether the jury was misdirected by the presiding judge." *First Unitarian Society of Chicago* v. *Faulkner* (1875), 91 U.S. 415, 423, 23 L.Ed. 283, 286.

Referring to the exact language of the Seventh Amendment and the right of any Appellate Court to reexamine facts found by the jury, this court has said that such facts:

> "cannot be retried 'in any court of the United States otherwise than according to the rules of the common law'. The only modes known to the common law 'to reexamine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a *venire facias de novo* by the Appellate Court, for some error of law which intervened in the proceedings.'" *Chicago B. & Q. R. Co. v. Chicago* (1896), 166 U.S. 226 at p. 246, L.Ed. 919, at p. 988.

The trial judge did not see fit to grant petitioner's motion for new trial on hearing in that court. The Court of Appeals found no prejudicial error upon reviewing the evidence and the full charge made by the trial judge to the jury. That court determined that although the tendered instruction on "proper lookout" was a proper statement of the law, its refusal was "inconsequential" of the result under Indiana law. (Petitioner's Appendix A. p. 14.) The record clearly reflects the trial judge instructed the jury on the essential elements and theory of plaintiff's case, to-wit: that respondent's driver was guilty of negligence if he occupied the south-bound lane of travel without justification or excuse therefor. (Appellant's Appendix, pp. 10 to 12.) Petitioner's contention of error for failure of the trial judge to instruct on her theory of action is not substantiated by the record, *nor could the giving of instructions on the duty to maintain a proper lookout control the result of the jury's deliberation or findings of fact.*

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

James J. Stewart,
Alvin E. Meyer,
1200 Merchants Bank Building,
Indianapolis, Indiana,
William E. Mills,
301 Odd Fellows Building,
South Bend, Indiana,
Attorneys for Respondent.